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90-244
No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

WILLIAM E. COLLINS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

1. Does a jury award of punitive damages violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution where there was no proof of actual damages and where state law provided no meaningful standards for the jury's discretion to "determine the severity of punishment"?

2. Does a jury award of punitive damages violate the Fourteenth Amendment where the award would be excessive under any applicable standard and where the award rests entirely on *respondeat superior* with no showing that defendant participated in or even had knowledge of the conduct complained of?

PARTIES TO THE PROCEEDING

Massachusetts Mutual Life Insurance Company *

William E. Collins

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* The following are non-wholly owned subsidiaries of the Massachusetts Mutual Life Insurance Company as well as companies that may be deemed affiliates thereof:

Bay Colony Life Insurance Company of Arizona
MassMutual Asset Management Company, Inc.
MassMutual of Ireland, Ltd.
MML Investors Services, Inc.
MML Real Estate Corporation
MML Realty Management Corporation
MML Syndicate, Inc.
MML Series Investment Fund
MassMutual Corporate Investors
MassMutual Participation Investors
MassMutual Integrity Funds

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STATUTES

28 U.S.C. § 1257 1

IN THE

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No. ———

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OPINIONS BELOW

The opinion of the Supreme Court of Alabama, dated July 20, 1990, is reproduced as Appendix A of this petition. Pet. App. 1a-12a. The March 18, 1989 opinion of the Circuit Court of Marion County, Alabama, denying petitioner's motion for judgment notwithstanding the verdict or in the alternative for a new trial, is reproduced as Appendix B of this petition. Pet. App. 13a-17a.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on July 20, 1990. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment, United States Constitution. Pet. App. 22a.

STATEMENT OF THE CASE

This case involves the constitutionality of a punitive damages award against an out-of-state corporation based on an alleged "fraud" in the sale of a life insurance policy. In May 1983, plaintiff William E. Collins, a bank vice-president, purchased an additional life insurance policy from Massachusetts Mutual Life Insurance Company (Mass Mutual) through an independent contractor agent, Thomas Smart. This policy was intended to supplement Collins' existing $15,000 life insurance policy from Mass Mutual, for which he was paying a monthly premium of $19.51 and which then had a cash value of between $1,500 and $1,800. Pet. App. 2a. Collins' new policy was in the amount of $85,000 and had an annual premium of $1,307.55. *Id.* Thus, the two policies gave Collins $100,000 in life insurance coverage with Mass Mutual.

Despite the substantial increase in his coverage, Collins had *no* increase in his monthly premium of $19.51. To accomplish this result, Collins executed an "Authorization-Use of Dividends" form at the time he applied for his new policy. This authorization directed that the dividends on the existing policy were to be applied toward the premiums on the new policy.[1] In addition, he elected that

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[1] On the "standing dividend order," signed by Collins on May 17, 1983, Collins checked a box directing Massachusetts Mutual

> [t]o surrender enough Paid-up additions or Dividend Accumulations under the policy(s) listed below to pay the annual premium due on the policy shown above. Paid-up additions and Dividend Accumulations will be surrendered under the policies listed below in ascending policy number order, beginning with the lowest policy number.

One policy number, apparently the number of Collins's existing policy, is written in the space below the quoted text.

dividends on the new policy be used to reduce premiums on that policy. Thereafter, on the first and second anniversaries of the new policy, Collins executed "Loan Certificates" which authorized payment of the annual premiums on the new policy through policy loans on the original policy. By utilizing dividends and policy loans in this fashion, Collins was able to obtain the additional $85,000 in coverage he desired without any additional monthly premium beyond the $19.51 he had been paying.

On October 3, 1986, nearly three and a half years after taking out the new policy and following the death of the independent contractor agent, Collins filed this action in the Circuit Court of Marion County, Alabama. In charging Mass Mutual with "fraud" in the sale of an insurance policy, Collins did not suggest that Mass Mutual had failed to provide him the insurance coverage he had desired. Nor did he surrender or otherwise repudiate the new policy. Rather, Collins alleged that he did not know that policy loans would be used to pay the premiums for the second policy despite the fact that he (a) was a bank executive, presumably capable of understanding the financing arrangement by which his coverage increased from $15,000 to $100,000 without a premium increase, and, indeed, (b) had executed documents specifically authorizing that arrangement.[2] The jury ultimately found in his favor on this "fraud" claim and, after being charged on the availability of punitive damages, returned a verdict of $750,000 against Mass Mutual. Pet. App. 18a. Because no actual damages had been proved,[3] it

[2] At trial, Mass Mutual was not permitted to introduce into evidence an initial letter sent by the agent to Collins on May 9, 1983, which explained the proposed arrangement, referring specifically to "leveraging". The Alabama Supreme Court held that the exclusion of this evidence was "error", but "harmless". Pet. App. 9a.

[3] At trial, Collins claimed no out-of-pocket loss and alleged only that he had been "damaged" to the extent of policy loans that he

must be inferred that the entire award of $750,000 represented punitive damages.

Mass Mutual promptly moved for judgment notwithstanding the verdict or in the alternative for a new trial. It contended, *inter alia*, that the award violated due process under the United States Constitution because Alabama law provided no standards to guide the jury's discretion in awarding punitive damages and because the punitive damages were based solely on the activities of the agent. Pet. App. 19a. The trial court denied the motion. Pet. App. 13a.

Mass Mutual appealed to the Supreme Court of Alabama, again arguing, *inter alia*, that the award violated due process under the United States Constitution. On April 2, 1990, during the pendency of the appeal, this Court granted certiorari in *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989). *See* —— U.S. ——, 110 S. Ct. 1780 (1990). That case, like this one, involves a due process challenge to an award of punitive damages.

On July 20, 1990, the Supreme Court of Alabama affirmed the judgment of the trial court, characterizing the due process claim as "similar" to that rejected "without discussion" in *Haslip*. Pet. App. 10a. Without explanation, the Court stated that the damages award "was not excessive" and that the trial court had "applied the guidelines" for punitive damages awards previously enunciated in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986).[4] Pet. App. 11a. The Court did not address

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had not been informed of and interest on such loans, a temporary and self-liquidating sum. The jury made no specific finding of actual damages.

[4] The *Hammond* "guidelines" to which the Court referred govern the decision-making of the trial judge in reviewing a jury award of damages, rather than the decision-making of the jury itself:

> Our cases reflect a number of factors which are appropriate for the trial court's consideration: The culpability of the de-

Mass Mutual's argument as to the constitutionality of punitive damages based on *respondeat superior*. Justice Houston filed a specially concurring opinion pointing out the need for "meaningful standards" in assessing punitive damages. Pet. App. 11a. Justice Maddox, concurring only in the result, argued that Alabama law concerning punitive damages "fails to guarantee to defendants the 'fundamental fairness' that the Constitution requires." Pet. App. 12a.

> fendant's conduct [citation omitted]; the desirability of discouraging others from similar conduct [citation omitted]; the impact upon the parties [citation omitted]. These are by no means exclusive. Justice may well require the consideration of other factors, such as the impact on innocent third parties. We make no attempt to enumerate all the factors which may be considered by the trial court. We instead leave that to its sound discretion. We do emphasize, however, that only where the record establishes that the award is excessive or inadequate as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive may a court order a new trial or remittitur.

493 So. 2d at 1378. The Alabama Supreme Court has elsewhere stated:

> Punitive damages need bear no particular relationship to actual damages. [Citations omitted.] Furthermore, punitive damages will not be disturbed unless they are so excessive that they shock the judicial conscience or are so excessive as to indicate passion or prejudice on the part of the trier of fact. [Citations omitted.] The damages in this case were not so excessive as to shock the judicial conscience or to indicate passion or prejudice on the part of the trier of facts.

Yesterday's, Inc. v. Lamey, 492 So. 2d 988, 990 (Ala. 1986).

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS REPEATEDLY RECOGNIZED THE EXCEPTIONAL IMPORTANCE OF THE ISSUES PRESENTED IN THIS CASE AND IN *HASLIP* CONCERNING THE DUE PROCESS LIMITS ON PUNITIVE DAMAGE AWARDS

In granting the writ of certiorari in *Pacific Mutual Life Insurance Co. v. Haslip, supra*, this Court recognized that the constitutionality of punitive damage awards under the Due Process Clause presents an important issue warranting this Court's consideration. That issue is sufficiently important to justify a grant of certiorari in this case, as well. By ordering an expedited briefing schedule in this case, or by postponing oral argument in *Haslip* to permit normal briefing in this case, this Court would be able to consolidate both cases for argument, consideration and decision. Such a result would ensure not only a fuller development of this question than would be possible with the *Haslip* case alone,[5] but also, that this important question does not elude this Court's consideration once again.

The significance of the issue presented is clear from prior cases of this Court. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held punitive damages unconstitutional in an entire category of cases. That case invalidated an award of punitive damages for defamation where liability was not based on a showing of knowledge of falsity or reckless disregard for truth. *Id.* at 349. Although the Court's holding stemmed from the potential threat to First Amendment freedoms posed by punitive damage awards in defamation actions, the Court also expressed a concern about punitive damages generally: "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not

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[5] Oral argument in the *Haslip* case is currently scheduled for October 3, 1990.

be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.* at 350.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court granted certiorari to review a number of constitutional challenges to the Alabama law of punitive damages. However, the Court ultimately determined that it was inappropriate to reach those questions there in light of other defects which required that the decision below be vacated.[6] Nonetheless, the Court made clear that the due process challenge and an Eighth Amendment challenge "raise important issues which, in an appropriate setting, *must* be resolved." *Id.* at 828-29 (emphasis added).

Similarly, in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the Court declined to reach a due process challenge to a punitive damage award, finding that the argument had not been raised below. *See id.* at 76-77. The concurring opinion of Justice O'Connor observed, however, that the due process issue "is worthy of the Court's attention in an appropriate case," *id.* at 87, and that the "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process," *id.* at 88. Nonetheless, because the petitioner had raised the issue belatedly, Justice O'Connor agreed that "[t]his due process question, serious as it is, should not be decided today." *Id.*

Most recently, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, —— U.S. ——, 109 S. Ct. 2909 (1989), the Court's efforts to resolve the constitutionality of punitive damages under the Due Process Clause were frustrated because the issue had not been preserved below.

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[6] The Court in *Aetna Life Insurance* did not reach the various constitutional objections to the award because the Court found that due process required a judicial disqualification in the lower court and therefore vacated the decision of the court below.

See id. at 2921. Significantly, four members of the Court, in two concurring opinions, expressed doubt as to the permissibility under the Due Process Clause of punitive damages assessed by juries with minimal guidance. *See id.* at 2923 (Brennan, J., concurring); *id.* at 2924 (O'Connor, J., concurring in part and dissenting in part).

As the Court's prior actions in this area make clear, the issues presented by this case are of the highest constitutional significance and deserve prompt and thorough attention. To date, they have not been reviewed for a variety of reasons wholly unrelated to their merits. By granting certiorari and consolidating this case for argument with *Haslip*, this Court will have an opportunity not only to resolve those issues at long last, but also, to resolve them on the basis of a broader factual record.

II. THIS IS AN APPROPRIATE CASE FOR RESOLVING THE ISSUES PRESENTED

This case provides an ideal opportunity for consideration of the issues presented. As in many cases involving punitive damages, the jury instructions here provided no meaningful standards to guide the jury in determining whether to award punitive damages, and, if so, in what amount.[7] The jury was instructed that "[t]he imposition of punitive damages is entirely discretionary . . . . Should you award damages, in fixing the amount you must take into consideration the character and degree of wrong as shown by the evidence in the case and the necessity of preventing similar wrongs." Pet. App. 21a. This language provides no more guidance than the instruction which Justice Brennan found objectionable in his concurrence in *Browning-Ferris*.[8]

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[7] The relevant portion of the jury instructions is reproduced at Pet. App. 21a.

[8] Justice Brennan quoted the instruction given to the jury on punitive damages in *Browning-Ferris Industries*: " 'In determining the amount of punitive damages, you may take account of the

Moreover, even if Collins had been injured, there was no evidence that Mass Mutual participated in that injury. The conduct complained of was solely that of the independent contractor agent who sold the policy; there was no evidence that Mass Mutual directed, ratified, or even knew of the agent's "wrongful" activities. This is a variation of the *respondeat superior* issue in *Haslip* where the agent was acting for another non-defendant principal; in this case, the agent was acting nominally for the defendant. This important distinction means that this case is deserving of review on certiorari, no matter how *Haslip* is decided.

Finally, this case highlights the unpredictable and oppressive nature of punitive damages awards. As noted earlier, there was no specific finding that Collins suffered any actual damages from the alleged "fraud" perpetrated upon him. Nor could there have been since Collins got precisely what he sought in purchasing the additional policy—higher insurance coverage for exactly the same premium. Because he has never disavowed the expanded coverage, he would presumably still claim that benefit today. Nonetheless, the jury awarded him $750,000. Pet. App. 18a. This case is thus distinguishable from *Haslip*, where the plaintiff suffered actual harm. Because there were *no* actual damages here, the punitive damages award bears *no* relationship to any "harm" suffered. The lower court's sanction of a punitive damages "multiplier" equal to infinity would raise serious due process issues, even if this Court were to affirm the *Haslip* decision.

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character of the defendants, their financial standing, and the nature of their acts.'" 109 S. Ct. at 2923. Justice Brennan characterized the instruction as "scarcely better than no guidance at all." *Id.*

III. GRANTING THE PETITION WILL INSURE FULLER CONSIDERATION OF THE ISSUES PRESENTED IN *HASLIP*

Although this case includes some of the same issues present in *Haslip*, there are significant differences as well. Consideration of the issues in both cases together will assist the Court's resolution of these important issues.

In *Haslip*, conduct of the agent was admittedly fraudulent, but was not in furtherance of the defendant's business and there was an issue as to whether the defendant knew or should have known of it. In this case, the agent was an independent contractor nominally representing Mass Mutual, and there was no evidence that Mass Mutual even had knowledge of the conduct complained of until after the independent contractor agent's death. Thus, this case presents more sharply than *Haslip* the threshold question whether *any* award of punitive damages would be consistent with the requirements of due process.

Further, the impact of the conduct complained of is radically different in the two cases. In *Haslip*, the plaintiff was seriously damaged when she was confronted with the bills for an expensive hospitalization after her health insurance had been terminated through no fault of her own. Here, Collins admittedly had no out-of-pocket expense and the only "damage" he claimed was a temporary obligation that would be eliminated in time without any increase in the premium he had been paying. Thus, this case presents a facet of the damages issue not present in *Haslip*, *i.e.*, may punitive damages be imposed consistent with due process where there has been no showing or finding of actual harm to the plaintiff?

Finally, this case presents the issue whether the punitive damages awarded were excessive with a dimension not present in *Haslip*. Where, as here, there is *no* finding of actual damages and a $750,000 award of punitive dam-

ages, there can be no reasonable relation between the two; the punitive damages are infinitely large in relation to the actual. This aspect also may contribute to the Court's perspective in dealing with the excessiveness of punitive damages under due process.

Because discretionary punitive damages have a long history and are found in the laws of many states,[9] this issue is entitled to the most thorough consideration on the broadest possible record. Granting certiorari here will assist the Court in achieving that purpose if this case is consolidated with *Haslip*. If that is not done, this case is entitled to consideration on its own.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[9] *See Browning-Ferris Industries*, 109 S. Ct. at 2922 n.24.

APPENDICES

APPENDIX A

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1990

88-949

MASSACHUSETTS MUTUAL LIFE INSURANCE CO.

v.

WILLIAM E. COLLINS

Appeal from Marion Circuit Court

(CV-86-166)

[July 20, 1990]

PER CURIAM.

The plaintiff, Eddie Collins, sued Massachusetts Mutual Life Insurance Company for fraud, conspiracy to defraud, outrage, and fraudulent representations, all arising from the sale of an insurance policy. The jury returned a $750,000 verdict in favor of Collins; the trial court entered a judgment based on that verdict; and Massachusetts Mutual appeals.

FACTS

Eddie Collins obtained a $15,000 whole life policy from Massachusetts Mutual in 1967, when he was 19 years old

(policy #1). He timely paid the monthly premium of $19.51 over the years. In May 1983, Collins was approached by a Massachusetts Mutual agent, Tom Smart, regarding the purchase of additional life insurance. Policy #1 had an accumulated cash value of between $1,500 and $1,800 at that time.

Smart sent Collins a letter on May 9, outlining the proposed "update" program formulated by Smart for Collins (policy #2). This "update" program proposed that Collins purchase additional coverage in the amount of $85,000, increasing his total coverage to $100,000. The $1,307.55 annual premium for policy #2 was to be paid out of the dividends from policy #1 and policy #2 as well as out of loans drawn against the cash value of policy #1. *Collins contends that he was unaware that the accumulated cash value of policy #1 would be used to fund policy #2.* This fact is the heart of the alleged fraud. In his letter, Smart represented to Collins that no additional premiums would be needed to fund policy #2.

Smart met Collins for lunch at some point after the May 9 letter had been mailed. Collins brought along as an advisor Zadus Turner, an independent insurance agent who was an old friend of Collins. At this luncheon meeting, Smart produced spread sheets outlining the payment schedule for policy #2. Collins decided to purchase the additional coverage.

In June 1984, Collins received a bill for the premium on the new policy. Collins contacted Smart because, he says, he had thought that he would not need to make additional premium payments on policy #2. Smart sent Collins a form on June 18 that was captioned "Loan Certificate." Along with the form, Smart included a letter that stated that policy #1 was being "leveraged" to cover the premium for policy #2 and that "we are merely leveraging against future dividends." Collins completed the "Loan Certificate" and returned it to

Massachusetts Mutual. This entire procedure was repeated in 1985. Massachuetts Mutual agent Smart died shortly after the form was returned in 1985.

Upon receiving a bill for the premium on policy #2 in June 1986, Collins contacted a representative of Massachusetts Mutual, who explained that policy #2 was being funded by a series of loans against the cash value of policy #1. Collins sued Massachusetts Mutual.

Massachusetts Mutual makes several allegations of error.

I

Massachusetts Mutual argues that Collins's action was barred by the two-year statute of limitations. Code of Ala. 1975, § 6-2-3 provides:

> "In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action."

Massachusetts Mutual contends that Collins knew or should have discovered the underlying facts constituting the alleged fraud at the time that the first loan certificate was issued in June 1984, over two years before suit was filed. It argues that Collins signed a form captioned "Loan Certificate," that the loan certificate was unambiguous, and that the word "loan" appeared 11 times in the document. Massachuetts Mutual contends that by virtue of having executed the loan certificate Collins was put on notice as early as June 1984 that the cash value of policy #1 was being used as collateral to finance policy #2.

Facts constituting fraud are considered discovered when they actually have been discovered or when they should have been discovered. *Gonzales v. U-J Chevrolet*

Co., 451 So.2d 244 (Ala. 1984). It is ordinarily a jury question whether a party discovered or should have discovered a fraud earlier than the date claimed.[1] *Ratledge v. H & W, Inc.*, 435 So.2d 7 (Ala. 1983).

Collins contends that he was mislead by Smart into believing that the loan certificate applied only to the dividends. Collins testified that Smart repeatedly assured him that only dividends were leveraged, and that dividend leveraging was referred to in the May 9 letter from Smart to Collins.

In view of these facts, we believe that Collins presented at least a scintilla of evidence that he did not have notice of the fraud in June 1984. Therefore, the question of the time at which Collins should have discovered the fraud was properly before the jury.

II

Massachusetts Mutual argues that Collins was improperly allowed to introduce into evidence a letter from Smart to a third party. The letter was sent by Smart to Bill Fishburne, who was advising his law partner, Charles Sharp, regarding the purchase of life insurance. Smart was attempting to sell to Sharp a plan similar to the one he had sold to Collins. Although the letter used no names, Smart related the details of a plan that had been sold to another person. This other person was described as a 35-year-old male non-smoker, with an existing $15,000 policy purchased by him at age 19 for a monthly premium of $19.51. The letter also stated that this person had purchased $85,000 of additional coverage. An employee of Massachusetts Mutual acknowledged

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[1] We note that this case was filed on October 3, 1986; therefore, the "scintilla rule" of evidence applies. "[T]he scintilla rule requires that issues in civil cases must go to the jury if the evidence, or a reasonable inference therefrom, furnishes a glimmer or trace in support of an issue." *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Haynes*, 497 So.2d 82, 85 (Ala. 1986).

that Collins was the only one of Smart's customers who fit the profile described in the letter.

The letter went on to describe the "dividend averaging" concept as well as the "dividend leveraging" concept at issue here. Massachusetts Mutual argues that the letter was irrelevant because it was sent to a third party. We cannot agree. Under the particular facts of this case, we believe that there was evidence presented from which the trial court could have determined that the letter was relevant. Not only did the profile match Collins perfectly, but also a Massachusetts Mutual employee acknowledged that Collins was the only one of Smart's customers who matched the profile. "Question of materiality, relevancy, and remoteness rest largely with the trial judge, and his rulings must not be disturbed unless his discretion has been grossly abused." *Ryan v. Acuff*, 435 So.2d 1244, 1250 (Ala. 1983).

We hold that the trial judge did not abuse his discretion in admitting the letter.

III

Massachusetts Mutual also argues that the trial court erred in allowing Sharp to testify concerning his transactions with Smart. Massachusetts Mutual first argues that Sharp's testimony is barred by the Dead Man's Statute. We disagree. In order for the Dead Man's Statute to apply and render a witness's testimony incompetent, four criteria must be met: (1) The testimony must concern a statement by or a transaction with a deceased person; (2) the estate of this deceased person must be affected by the outcome of the suit, or the deceased person must have acted in a representative relation with the party against whom such testimony is to be introduced; (3) the witness must have a pecuniary interest in the result of the suit; and (4) the interest of the witness must be opposed to the interest of the party against whom he is called to testify. See *Melvin v.*

Parker, 472 So.2d 1024 (Ala. 1985); *Stanley v. Hayes*, 276 Ala. 532, 165 So.2d 84 (1964); Ala. Code 1975, § 12-21-163.

Clearly, Sharp's testimony meets criteria (1), (2), and (4). Sharp testified as to statements made by a deceased person. Sharp's testimony was used against a party represented by the deceased, and Sharp's interest is opposed to that of Massachusetts Mutual as evidenced by a separate lawsuit filed by Sharp against Massachusetts Mutual. Criterion (3) is more problematic. Massachusetts Mutual argues that because a similar lawsuit filed by Sharp against Massachusetts Mutual was pending at the time of trial, Sharp had a pecuniary interest in the outcome of this suit. In order for a pecuniary interest to bar testimony, it must be present, certain, and vested, not uncertain, remote, or contingent. *City of Rainbow City v. Ramsey*, 417 So.2d 172 (Ala. 1982).

Massachusetts Mutal argues that because Sharp's case is pending in the same county, because the same attorneys are representing the parties, and because the case potentially will involve the same judge and witnesses, he has a direct pecuniary interest in the outcome of Collins's case. While we agree that the outcome of Collins's case may have an impact on Sharp's case, we cannot say that such a potential impact is present, certain, and vested. Sharp, therefore, does not have a direct pecuniary interest in the present case that would act to bar his testimony.

Massachusetts Mutual also contends that Sharp's testimony should not have been allowed because his transactions with Smart were significantly dissimilar from Collins's transactions with Smart. In order to admit other false representations in a fraud case, the other representations must be similar in nature to those alleged in the complaint, *Sessions Co. v. Turner*, 493 So.2d 1387 (Ala. 1986), and the transaction must be of substantially the same character, *Great American Ins. Co. v. Dover*, 221

Ala. 612, 130 So. 335 (1930). In the present case, Sharp had eight Massachusetts Mutual Life Insurance policies with a total face value of $131,000. Sharp's policies were not unencumbered; he had several loans outstanding against their value at the time he was approached by Smart. Sharp also testified that his secretary handled most of the details of the transactions. Massachusetts Mutual argues that these differences between Sharp's situation and Collin's disqualify Sharp from testifying. Collins points out that both Collins and Sharp had been longtime Massachuetts Mutual policyholders and had significant accrued cash values. Both were approached in 1983 by Smart and were sold "update" programs based upon a "stream of dividends." Both were told that they would receive additional insurance with no increase in their monthly premium, and both were shown income projections which later turned out to be false. Based upon this evidence, the trial court did not err in finding that Collins's and Sharp's transactions with Smart were substantially of the same character so as to allow Sharp's testimony. We find no error here.

IV

Massachusetts Mutual also argues that the trial court erred in refusing to admit the May 9 letter from Smart to Collins soliciting his business. Collins's objection to the introduction of the letter was based upon the Dead Man's Statute. Massachusetts Mutual argues, and we agree, that Collins was not in a position to assert the Dead Man's Statute. The Dead Man's Statute provides protection to the decedent's estate or its successors.

The Dead Man's Statute provides:

> "In civil actions and proceedings, there must be no exclusion of any witness because he is a party or interested in the issue tried, except that no person having a pecuniary interest in the result of the action or proceeding *shall be allowed to testify against*

> *the party to whom his interest is opposed as to any transaction with, or statement by, the deceased person whose estate is interested* in the result of the action or proceeding or when such decreased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, *unless called to testify thereto by the party to whom such interest is opposed or unless the testimony of such deceased person in relation to such transaction or statement is introduced in evidence by the party whose interest is opposed to that of the witness or has been taken and is on filed in the case.* No person who is an incompetent witness under this section shall make himself competent by transferring his interest to another.

§ 12-21-163 (emphasis added).

Although the wording of this section is not completely clear, it is clear enough that the statute is meant to protect the interests of the decedent from the testimony of the living concerning transactions that occurred between the deceased and the witness. In this case, the party, who for all intents and purposes represents the interests of the decedent, seeks to introduce a *letter from the deceased to the opposing party.*

> "The purpose [of the Dead Man's Statute] is to prevent the surviving party from having the benefit of his own testimony where, by reason of the death of his adversary, his representative is deprived of the decedent's version of the transaction or statement."

81 Am.Jur.2d *Witnesses* § 304 (1976).

Clearly, Collins cannot exclude the letter under the provisions of the Dead Man's Statute; therefore, the trial judge erred in refusing to allow the letter.

While it was error for the trial judge to exclude the letter from evidence, we do not believe that such error requires reversal. The illustrations attached to the letter were the same illustrations attached to the Sharp letter which was properly introduced into evidence. The text of the letter illustrated both dividend averaging and dividend leveraging. Concerning dividend averaging, the letter stated:

> "When a net premium is due, paid additions are surrendered to pay it. This *reduces* the value of your paid additions account. When dividends exceed the annual premium of your new coverage, this *increases* the value of your paid additions account." (Emphasis in original.)

Concerning dividend averaging, the letter provided:

> "When the cash value of paid additions is all used, you would then leverage current premium payments against future dividends by borrowing against policy guaranteed values. This, of course, would involve policy loans and loan interest. However, under dividend leveraging, the loan interest is *not paid*—you are still paying your same $19.51 a month. When the future dividends exceed the annual premium cost, the excess pay off the loan for you. You end up with greater coverage, greater cash value, and greater dividend income." (Emphasis in original.)

As discussed in part I, it is clear that the jury believed that Collins was mislead by Smart.

We hold that the error in failing to permit the introduction of the letter was, at most, harmless error. Rule 45, A.R.App.P.

V

Masachusetts Mutual contends that the trial court committed error in allowing Collin's counsel to read from documents not in evidence in formulating his questions.

Massachusetts Mutual argues that this type of questioning violated the best evidence rule and, in one instance, the Dead Man's Statute.

After reviewing the questions at issue, we are of the opinion that the questions requested information within each witness's personal knowledge. Such questions do not violate the best evidence rule. *Cuppa v. Upton*, 489 So.2d 544 (Ala. 1986).

Massachusetts Mutual also contends that some of the questions asked of Collins violated the Dead Man's Statute. These questions referred to a handwritten note from Smart to Collins that accompanied the loan certificates discussed earlier. Collins claims that Massachusetts Mutual's attorneys, during their cross-examination, opened the door and allowed Collins's attorney to question him on redirect concerning the accompanying note. We agree. The note repeatedly stated that Collins should not be alarmed and that the "game plan [was] intact."

Massachusetts Mutual, by extensively questioning Collins about the loan certificate, opened the door to questions concerning the accompanying note. The Dead Man's Statute is subject to waiver in cases where the deceased party's representative questions a witness concerning his transactions with the deceased. *Poston v. Gaddis*, 372 So.2 1099 (Ala. 1979). The trial court did not err on this issue.

VI

Lastly, Massachusetts Mutual argues that the award of $750,000 is excessive. Its contention is that the imposition of punitive damages violates the due process rights embodied in the United States Constitution. This Court dismissed, without discussion, a similar claim in *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989). The United States Supreme Court has granted certiorari in that case.

We note that the trial court applied the guidelines found in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and found that the damages award was not excessive. Upon review of the facts of this case, we likewise find that the damage award was not excessive.

Based upon the foregoing, the judgment of the trial judge is due to be affirmed.

AFFIRMED.

Hornsby, C.J., and Jones, Shores, Adams, Steagall, and Kennedy, JJ., concur.

Houston, J., concurs specially.

Maddox, J., concurs in the result.

HOUSTON, JUSTICE (concurring specially).

I concur with the majority opinion.

I have been singing from the hymnal used by Justice Maddox on the need for meaningful standards for jury and trial court assessment, and trial court and appellate review, of punitive damages since I have been a Justice on this Court. The phrase "meaningful standards" does not mean that the amount of punitive damages must be small, but only that the amount should be arrived at as a result of the party against whom such damages are assessed having been afforded procedural due process. The amount of punitive damages must reasonably relate to the wrong and the wrongdoer, or as W.S. Gilbert wrote and retired Justice Samuel A. Beatty did frequently quote:

> "To let the punishment fit the crime—
> "The punishment fit the crime; . . ."

The Mikado (1885).

MADDOX, JUSTICE (concurring in the result).

I concur in the result reached, but I continue to adhere to the view I expressed in a dissent in *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989), that the United States Supreme Court will hold, on review of that case, that Alabama's scheme for the award of punitive damages fails to guarantee to defendants the "fundamental fairness" that the Constitution requires.

For over a decade I have questioned the process that this Court has used to award punitive damages in cases involving claims such as the one presented in this case, and I have suggested that the legislature—or this Court—should consider alternatives to an action against an insurance company for fraud or bad faith failure to pay a claim.

The award of $750,000 in this case, while three times more than the "cap" set in the so-called tort reform legislation (which does not apply in this case), is not substantially different from awards made in similar cases. It is on that basis that I concur in the result. Until the Supreme Court of the United States decides the "due process" question that is presented in *Pacific Mutual*, I will not know whether my prediction about the outcome of that case will be proven accurate. In the meantime, I see no useful purpose to be served by continuing to dissent when the bench and bar are duty bound to apply the law as expressed by a majority of this Court. Because of that, I concur in the result.

APPENDIX B

IN THE CIRCUIT COURT
OF MARION COUNTY, ALABAMA

Civil Action No. CV-86-166

WILLIAM E. COLLINS,
Plaintiff,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Defendant.

ORDER

[Filed March 15, 1989]

This cause coming up to be heard on the motions of defendant for judgment notwithstanding the verdict or in the alternative for a new trial, upon plaintiff's Exhibit A from the hearing of March 10, 1989, and the argument of counsel on said motions, now upon consideration of the foregoing, the Court bases its below adjudication on the following reasons and factors:

This court omits any citations of law, as the Supreme Court of Alabama is certainly knowledgeable of the law of this state.

The undersigned Judge was the trial Judge and, of course, the Judge who has heard the post-trial matters, and at no time did it appear to the Court that any party in this case received less than a fair and impartial trial before the jury, and no time has it appeared to the

Court that the verdict was a result of bias, passion, prejudice, corruption or other improper motive.

The court observed the attentiveness and apparent understanding by the jurors of the issues and evidence in this case. The court particularly noted, as the Jury could, the testimony of Richard Turek, Senior Field Investigator for Masachusetts Mutual. His reluctance and evasiveness in answering questions was apparent. At the time Mr. William E. Collins justifiably reposed his trust in Massachusetts Mutual's agent, Tom Smart, in May of 1983, he was already a policyholder with Massachusetts Mutual and his original policy had accumulated substantial cash value. A Massachusetts Mutual Life Insurance policy with a face value of $15,000.00 had been in effect since Mr. Collins was 19 years old. This original policy had a low monthly premium and a large cash value as Mr. Turek admitted.

There was sufficient evidence through third party witnesses that the sale of an additional $85,000.00 policy in May of 1983 was represented to Mr. Collins as not involving policy loans. In Plaintiff's Exhibit 1, Mr. Smart, deceased at the time of trial, had represented to an independent third party that the basis of his sale to Mr. Collins was that "In essence, he had $100,000.00 of permanent coverage for $19.51 per month, with no sacrifice in total cash value". Eventually, Mr. Turek admitted that, at the time of the sale and at the time of trial, Mr. Collins did not get an additional $85,000.00 of life insurance for the same low monthly premium with no sacrifice in his total cash value.

The jury also considered Plaintiff's Exhibit 6 which was the agent's statement sent by Mr. Smart to Massachusetts Mutual regarding the sale of the $85,000.00 policy to Mr. Collins. Paragraph 6 of this document clearly shows that the insurance plan to Mr. Collins was not to involve loans and his present policy with Massachusetts Mutual would not be "subjected to borrowing

of loan values." The jury also heard the testimony of Mr. Zadus Turner, a friend of Mr. Collins and a local insurance agent in Mr. Collins' hometown. Turner, Collins and Smart met for lunch and discussed Collins' program. Mr. Turner reviewed illustrations produced by Mr. Smart similar to those attached to Plaintiff's Exhibit 1, but which were "computer generated". Mr. Turner unequivocably stated that had policy loan provisions been included in the plan, as discussed at the luncheon meeting, he would have recalled them (R 61-R 62). From this the jury could conclude, and by their verdict did conclude, that the representations made by Massachusetts Mutual's now-deceased agent, Thomas Smart, were false and deceiving and induced the Plaintiff to purchase additional life insurance which was ultimately funded, that is the monthly payments were made, from existing cash value of his old insurance policy. From the further testimony, including that of Charles Sharp, the jury could reasonably have further concluded that the Defendant's actions were gross, malicious, oppressive and made with the intent of injuring and defrauding the Plaintiff.

The jury could have concluded, and the evidence amply supported such conclusion, that the Defendant's conduct was intentional or reckless and was in furtherance of its ordered corporate policy of updating its old policies which had a guaranteed low interest rate in the event of borrowing against the cash value, by providing a new and higher and more flexible rate and inducing the sale (and resulting commissions) of new insurance by the promise of additional dividends. It is desirable that the Defendant and others similarly situated be discouraged from misleading and deceiving old and new policyholders and members of the public.

Having in mind the above culpability of the defendant's conduct, the undersigned judge finds that the circumstances of this case are probably not that rare an occurrence, and that this defendant (and the life insurance industry) and their agents should be discour-

aged from placing their interests above that of their customers when selling insurance policies. Insurance companies and their agents are in a position to have knowledge and information which the lay person does not have. A purchaser of insurance, such as William E. Collins has a right to rely on the representations of insurance agents and companies, particularly his own life insurance agent and his own life insurance company.

This verdict will not have a negative impact upon the defendant Massachusetts Mutual Life Insurance Company, and that if there would be any impact on innocent third parties, it is of such small significance or consequence that the jury's determination on damages should not be disturbed. This court does not find that the impact of this verdict on this defendant is such that would require a remittitur, nor is any impact of this verdict on other insurance companies likely to have any detrimental effect upon their ability to do business in Alabama.

From the facts at trial, this court was reasonably satisfied that the defendant insurance company was guilty of fraud, deceit or suppression. This court expressly finds and determines that sufficient evidence existed in this case to send the case to the jury, and further expressly finds and determines that the verdict is not erroneous in view of all the evidence that went to this jury.

The above facts relate only a portion of the facts which this Court relies upon to reach its decision on the motions. This Court knows of no reason why there should be any judicial invasion into the function of the jury under the facts in this case. This Court views this jury as a "properly functioning jury". This Court finds nowhere in the record where it is established that the award is excessive because it is based upon bias, passion, prejudice, corruption or other improper motive. This Court finds that the facts that it heard and saw justify a large and substantial award against the defendant.

Therefore, upon consideration of the foregoing, it is ordered and adjudged that the defendant's motions for judgment notwithstanding the verdict or in the alternative for a new trial are hereby denied.

Done this 15th day of March, 1989.

/s/ Carlton Mayhall, Jr.
CARLTON MAYHALL, JR.,
Judge

APPENDIX C

DOCKET ENTRY

WILLIAM E. COLLINS

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE CO.

Circuit Court of Marion County, Alabama

CV-86-166

Oct. 21, 1988

Trial; this day came Donna Noles and 10 others who, being duly empanelled, on their oaths do say: "We, the Jury, find for the plaintiff Collins and against the defendant Massachusetts Mutual and assess plaintiff's damages at $750,000.00, Foreman, s/Donna Noles." Therefore, it is ordered and adjudged that plaintiff William E. Collins shall have and recover of defendant Massachusetts Mutual Life Insurance Company, a corporation, the sum of Seven hundred fifty-thousand dollars ($750,000.00) together with the cost of this cause, for which if not paid, let execution issue according to law.

/s/ Carlton Mayhall, Jr.
Judge

APPENDIX D

IN THE CIRCUIT COURT
OF MARION COUNTY, ALABAMA

Civil Action No. CV 86-166

WILLIAM E. COLLINS,

Plaintiff,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a corporation,

Defendant.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR A NEW TRIAL

[Excerpts; Filed Nov. 18, 1988]

Comes now Massachusetts Mutual Life Insurance Company and moves the Court to set aside the verdict of the jury heretofore rendered on, to-wit: October 21, 1988 and the judgment of the Court entered thereon and to enter judgment in favor of this Defendant in accordance with its Motion for Directed Verdict or in the alternative, to grant unto Defendant a new trial, and as grounds for said motions, Defendant sets down and assigns the following, separately and severally:

* * * *

50. The imposition of punitive damages in this case violates the due process clause of the Fourteenth Amendment to the Constitution of the United States of America.

* * * *

61. The procedures pursuant to which punitive damages are awarded fail to provide a reasonable limit on the amount of the award against defendant, which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

62. The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

* * * *

71. The imposition of punitive damages against this Defendant, on the basis of vicarious liability for the conduct of others, violates the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

* * * *

APPENDIX E

Excerpt From Jury Instructions

* * * *

[R602] Now, "In addition to actual damages or compensatory damages, the law authorizes a jury to award exemplary or punitive, sometimes called 'vindictive' damages in these types of actions," that is, all except the one based on the alternative of mistaken misrepresentation. "If it is shown to the reasonable satisfaction of the jury by the evidence that that fraud or deceit or suppression was malicious, oppressive or gross," if you are reasonably satisfied from the evidence that the defendant was guilty of fraud or deceit or suppression with the exception of the mistaken misrepresentation as charged by the plaintiff, and that such fraud or deceit or suppression was malicious, oppressive or gross and made with the intent to injure and defraud the plaintiff, and the plaintiff did suffer injury or damage as a proximate result of such fraud or deceit or suppression, then in your discretion you may award the plaintiff punitive damages in addition to any actual or compensatory damages you find from the evidence that the plaintiff did suffer.

The law says, "The purpose of awarding punitive or exemplary damages is to allow money recovery to the [R603] plaintiff by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages, in fixing the amount you must take into consideration the character and degree of wrong as shown by the evidence in the case and the necessity of preventing similar wrongs."

Now—Again, the punitive damages doesn't apply to the third alternative of the fraud claim of mistaken misrepresentation.

* * * *

APPENDIX F

U.S. Constitution, Amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(3)

No. 90-244

Supreme Court, U.S.
FILED
SEP 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

WILLIAM E. COLLINS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's federal contentions were properly presented to the state courts below.

2. Whether Alabama's system for the award of punitive damages denied petitioner due process.

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IN THE

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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
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WILLIAM E. COLLINS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

1. This case involves what the courts below characterized as a course of "fraud, deceit or suppression" on the part of petitioner, the Massachusetts Mutual Insurance Co. (Pet. App. 16a), that was undertaken "with the intent of injuring and defrauding" respondent Collins. *Id.* at 15a. Respondent has been one of petitioner's policyholders since 1967, when he obtained a $15,000 whole life insurance policy on which he has timely paid monthly premiums of $19.51. *Id.* at 1a-2a. By May 1983, the policy had an accumulated cash value of between $1500 and $1800. *Id.* at 2a.

At that time one of petitioner's agents approached respondent and proposed that he purchase an additional $85,000 of insurance coverage.[1] According to the jury's findings, the agent represented to respondent that the premiums for this additional coverage would be financed out of the original policy's dividends; respondent was assured that no additional payments would be needed to fund the new insurance, that the accumulated cash value of the original policy would not be used to fund the additional coverage, and that "'[i]n essence, [respondent] had $100,000.00 of permanent coverage for $19.51 per month, with no sacrifice in total cash value.'" Pet. App. 14a; see *id.* at 2a, 15a. In fact, however, the $1307.55 annual premium for the additional coverage was paid largely out of loans that petitioner drew against the cash value of respondent's original policy. *Id.* at 2a. Petitioner's agent initiated this transaction, according to the trial court, "in furtherance of [petitioner's] ordered corporate policy of updating its old [insurance] policies which had a guaranteed low interest rate in the event of borrowing against the cash value, by providing a new and higher and more flexible rate and inducing the sale (and resulting commissions) of new insurance by the promise of additional dividends." *Id.* at 15a.

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[1] Petitioner variously refers to the agent as an "independent contractor" (Pet. 10) or an "independent contractor agent." Pet. 2, 3, 9. In fact, however, at no point during the proceedings below did petitioner suggest that the agent was an independent contractor. Petitioner did not request a charge on independent contractors; the jury was instructed extensively on agency. See RT 590, 592-594. Petitioner's witnesses at trial accepted the characterization of the agent as "an insurance agent for Massachusetts Mutual" (RT 159); petitioner's brief to the Alabama Supreme Court repeatedly referred to the agent as "the agent for Massachusetts Mutual" (App. Br. No. 88-949, at 5) or "its sales agent[]" (*id.* at 81), and recognized that "the jury below found that Mr. Smart [the agent] had not abandoned his agency." *Ibid.* The record makes clear that the agent was licensed by the Alabama Insurance Department as a Massachusetts Mutual agent, and he apparently was licensed to sell *only* for Massachusetts Mutual. Pl. Ex. 29, 31.

Petitioner's agent repeated his misrepresentations several times prior to his death in 1985. Pet. App. 2a-3a. Meanwhile, the cash value of respondent's insurance policy was depleted and respondent accumulated substantial liability on the loans drawn against the policy.[2] When respondent discovered the true nature of the transaction in 1986, he brought this fraud suit against petitioner in Alabama Circuit Court. *Id.* at 3a.

At the close of evidence, the trial judge extensively instructed the jury on agency. RT 590, 592-594. He also charged that, "in order for a jury to return a verdict imposing punitive damages there must be a finding of compensatory damages. * * * The jury must decide that there are due compensatory damages before any punitive damages can be imposed." RT 620-621. In addition, the trial judge instructed the jury that it could award punitive damages only upon finding "fraud or deceit or suppression [that] was malicious, oppressive or gross and made with the intent to injure and defraud the plaintiff" (RT 602, reprinted at Pet. App. 21a); that punitive damages are awarded "by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future" (RT 603, reprinted at Pet. App. 21a); and that "in fixing the amount you must take into consideration the character and degree of wrong as shown by the evidence in the case and the necessity of preventing similar wrongs." RT 603, reprinted at Pet. App. 21a. Petitioner did not object to these instructions on the ground that they

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[2] One of petitioner's witnesses agreed at trial with the statement that "Massachusetts Mutual has got over $2,000 of [respondent's] cash value." RT 503. Another of petitioner's representatives, in response to the question "[h]ow much money would it take to get [respondent's] program straightened out like he thought it was supposed to be" (RT 221), indicated that the sum was the amount of the accumulated loans (RT 224-226), which totaled many thousands of dollars. See Pl. Ex. 1, at 4.

failed to impose objective constraints on the jury's discretion, and did not request or propose instructions that would have imposed such constraints.[3] The jury returned a verdict of $750,000 for respondent, but did not expressly break the award into punitive and compensatory components. Pet. App. 1a.

2. Following the return of the verdict, the trial judge held a hearing to comply with the requirements imposed by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), which obligates trial courts "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id.* at 1379. The trial court first found that the evidence amply supported the finding of liability, noting that "the jury could conclude, and by their verdict did conclude, that the representations made by [petitioner's] now-deceased agent * * * were false and deceiving." Pet. App. 15a. The court added that "the jury could reasonably have further concluded that [petitioner's] actions were gross, malicious, oppressive and made with the intent of injuring and defrauding the Plaintiff." *Ibid.* In addition, the court's review of the record indicated that "[t]he jury could have concluded, and the evidence amply supported such conclusion, that the [petitioner's] conduct was intentional or reckless and in furtherance of its ordered corporate policy * * *." *Ibid.* The trial judge accord-

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[3] Petitioner did propose instructions that would have changed the *standard of proof* by requiring the jury to find the facts supporting imposition of punitive damages beyond a reasonable doubt or by clear and convincing evidence. See RT 611-612. But the substance of its proposed instructions would have imposed *less* specific constraints on the jury than the charge actually given; its proposed charge would have permitted an award of punitive damages had the jury found that petitioner acted with "malice, reckless disregard for the truth, or intent to injure" (Record before the Alabama Supreme Court [hereinafter cited as "CR"] 293, 294, 295, 296, 305, 306), and that "the conduct of the defendant was such conduct as to deserve the imposition of punishment." *Id.* 294, 296, 306.

ingly stated that he "was reasonably satisfied that the defendant insurance company was guilty of fraud, deceit or suppression." *Id.* at 16a.

The judge then turned to the size of the award. He found that "[i]t is desirable that [petitioner] and others similarly situated be discouraged from misleading and deceiving old and new policyholders and members of the public" (Pet. App. 15a), noting that "[i]nsurance companies and their agents are in a position to have knowledge and information which the lay person does not have." *Id.* at 16a. He also determined that "[t]his verdict will not have a negative impact upon the [petitioner]," adding that the judgment was not likely to have a detrimental effect on the ability of insurance companies to do business in Alabama. *Ibid.* And the trial judge concluded that "the facts that [he] heard and saw justify a large and substantial award against the defendant." *Ibid.* The trial court accordingly declined to set aside the award. *Id.* at 17a.

On appeal to the Alabama Supreme Court petitioner raised a statute of limitations argument and contested various evidentiary rulings under state law. These challenges were rejected. Pet. App. 3a-10a. The court below also conclusorily rejected petitioner's federal constitutional challenge to the award of punitive damages (*id.* at 10a), and noted that the trial court applied the *Hammond* factors in finding that the damage award was not excessive. *Id.* at 11a. The court added that it also had reviewed the record and "likewise find that the damage award was not excessive." *Ibid.*[4]

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[4] Two Justices concurred. Justice Houston wrote separately to emphasize that the amount of punitive damages "should be arrived at as a result of the party against whom such damages are assessed having been afforded procedural due process," explaining that "[t]he amount of punitive damages must reasonably relate to the wrong and the wrongdoer." Pet. App. 11a. By concurring with the majority opinion, Justice Houston indicated that he believed the applicable standard satisfied in this case. See *ibid.* The second

THE PETITION SHOULD BE DENIED

Petitioner launches three challenges to the judgment below. It asserts that the fraud in this case "was solely that of the independent contractor agent who sold the policy" (Pet. 9), adding that punitive damages may not constitutionally be awarded against a principal in such circumstances. It argues that the Due Process Clause requires some fixed relationship between punitive and compensatory damages that is missing in this case because, it asserts, "there were *no* actual damages here." Pet. 9 (emphasis in original). And it contends that the jury instructions did not provide constitutionally adequate standards to determine the availability and amount of a punitive award. Pet. 8. None of these contentions, however, was properly raised in the courts below. Two of them, moreover, simply are not present on the record in this case, while the third is argued here in highly incomplete form. The petition accordingly should be denied.

I. THE CONSTITUTIONAL ISSUES WERE NOT ADEQUATELY RAISED BELOW

1. At the outset, petitioner's constitutional arguments were not properly presented to the state courts. Although petitioner conclusorily listed due process objections in its answer to respondent's complaint (see CR 137-139), it never sought specific action from the trial court to vitiate its constitutional concerns. Petitioner thus did not advance its theory of punitive damages during the taking of testimony, did not seek dismissal of the punitive damages claims on constitutional grounds when it moved for a directed verdict at the close of evi-

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concurrence was written by Justice Maddox, who felt constrained by Alabama precedent to concur in the result; he predicted, however, that the Alabama system for the award of punitive damages would be held unconstitutional by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, No. 89-1279, cert. granted, 110 S.Ct. 1780 (1990). Pet. App. 12a.

dence (see CR 275-288), and did not object to the jury instructions on the ground that they failed to impose objective constraints on the jury's discretion—the gist of petitioner's current complaint before this Court.

To the contrary, as we explain above (at note 3, *supra*), while petitioner proposed instructions that would have changed the *standard of proof* by requiring the jury to find liability established beyond a reasonable doubt or by clear and convincing evidence (ironically, the one due process argument that it now appears to have abandoned), the *substance* of petitioner's proposed instructions would, if anything, have imposed *less* specific constraints on the jury than the charge actually given. Petitioner thus would have instructed the jury, in relevant part, that

> In order for the Plaintiff to recover any punitive damages in this case, you must be reasonably satisfied from the evidence that the fraud committed by the Defendant was accompanied by either malice, reckless disregard for the truth, or intent to injure.
>
> * * * *
>
> Before you can award the Plaintiff any punitive damages in this case, you must be reasonably satisfied from the evidence that the conduct of the Defendant was such conduct as to deserve the imposition of punishment, and if you determine, based upon the evidence in this case, that the conduct of the defendant does not deserve punishment, then your verdict should be in favor of the Defendant, insofar as awarding any punitive damages to plaintiff is concerned.

CR 293-294. See *id.* at 295-296, 305-306.

Petitioner thus would have permitted an award of punitive damages so long as its conduct was such "as to deserve the imposition of punishment." In contrast, the jury actually was instructed that punitive damages may be awarded only if the defendant's conduct "was mali-

cious, oppressive, or gross and made with the intent to injure and defraud the plaintiff" (RT 602, reprinted at Pet. App. 21a); that such damages are awarded "by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future" (RT 603, reprinted at Pet. App. 21a); and that "in fixing the amount you must take into account the character and degree of wrong as shown by the evidence in the case and the necessity of preventing similar wrongs." RT 603, reprinted at Pet. App. 21a.

Petitioner's failure to challenge the substance of the proposed instructions—indeed, its proposal of a substitute charge that would have offered a lesser restriction on the jury's discretion—amounted to a waiver of its constitutional challenge. Alabama rules make clear that "[n]o party may assign as error the giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless he objects thereto before the jury retires to consider its verdict, stating the matter to which he objects and the grounds of his objection." Ala. R. Civ. P. 51. It is irrelevant that petitioner belatedly advanced its constitutional claims when it filed its motions for judgment notwithstanding the verdict and for a new trial (Pet. App. 19a-20a); the Alabama Supreme Court "has held that constitutional issues may not be raised for the first time in a post-judgment motion." *United Services Automobile Ass'n v. Wade*, 544 So.2d 906, 917 (Ala. 1989). That court has applied the rule repeatedly.[5] The trial court accordingly made no mention of petitioner's con-

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[5] See, *e.g.*, *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 375-376 (Ala. 1989); *Alabama Power Co. v. Courtney*, 539 So.2d 170, 173 (Ala. 1988); *Alabama Power Co. v. Capps*, 519 So.2d 1328, 1330 (Ala.), app. dismissed, 108 S.Ct. 1723 (1988); *Southern Life & Health Insurance Co. v. Smith*, 518 So.2d 77, 82 (Ala. 1987).

stitutional contentions in its order rejecting the motions. Pet. App. 13a-17a.

It is true, of course, that the court below did not expressly refer to the Alabama rules in its rejection of petitioner's constitutional claim; instead, the court simply adverted to its decision in *Haslip*. See Pet. App. 10a. Whether this conclusory reference was meant to resolve anything more than petitioner's properly presented *procedural* due process argument on the appropriate standard of proof—and thus preserves for possible review in this Court petitioner's very different *substantive* due process argument—is unclear. See generally, *e.g.*, *Orr v. Orr*, 440 U.S. 268, 274-275 (1979). Surely, however, petitioner's lackadaisical attempts to advance its federal rights below, which denied the trial court any opportunity to cure the asserted constitutional violation by means of a simple change in the jury instructions, should not now be rewarded with discretionary review in this Court. The petition accordingly should be denied for this reason alone. Cf. *Osborne v. Ohio*, 110 S.Ct. 1691, 1703 (1990).

II. PETITIONER'S CONTENTIONS ARE PREMISED ON A MISLEADING OR INCOMPLETE ACCOUNT OF THE PROCEEDINGS BELOW

If the Court nevertheless concludes that the issues raised by petitioner were properly preserved below, we recognize the possibility that the Court will hold the petition pending disposition of *Pacific Mutual Insurance Co. v. Haslip*, No. 89-1279, cert. granted, 110 S.Ct. 1780 (1990). It bears emphasis, however, that two of the issues argued by petitioner are not present in this case, while petitioner presents the third in a highly selective fashion.

1. Petitioner variously characterizes the agent who committed the fraud as an "independent contractor" (Pet. 10) and an "independent contractor agent" (Pet. 2, 3, 9), and asserts that the award of punitive damages

against it as principal raises due process issues because "there was no evidence that [petitioner] directed, ratified, or even knew of the agent's 'wrongful' activities." Pet. 9. Petitioner's filing in this Court, however, is the first time during the course of this litigation that it has characterized the agent as an "independent contractor." As we note above (at note 1, *supra*), petitioner's witnesses at trial accepted the chacterization of the agent as "an insurance agent for Massachusetts Mutual" (RT 159); petitioner's brief to the Alabama Supreme Court repeatedly referred to "its sales agent[]" (App. Br. No. 88-949, at 5), and recognized that "the jury below found that Mr. Smart [the agent] had not abandoned his agency." *Ibid.* In fact, it appears from the record that the agent was licensed to sell insurance *only* for petitioner. Pl. Ex. 29, 31.

So far as the fraud itself is concerned, moreover, there was an element of direct culpability on petitioner's part: the sale to respondent that triggered this suit was made, according to the trial court, "in furtherance of [petitioner's] ordered corporate policy." Pet. App. 15a.[6] Indeed, the jury and trial court concluded that petitioner's own "conduct was intentional or reckless." *Ibid.* This case accordingly does not involve the sort of vicarious liability challenged by petitioner.[7]

2. Petitioner also asserts that, "[b]ecause no actual damages had been proved, it must be inferred that the

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[6] Respondent's complaint alleged that the agent's acts "were known to, authorized, or ratified by the defendant, Massachusetts Mutual." CR 268. The trial judge repeated this allegation when he summarized the complaint as part of the jury charge. RT 590.

[7] In any event, it should be added that the *respondeat superior* claim, even if properly presented here, is not independently worthy of review: this Court already has flatly rejected the due process contention advanced by petitioner, holding that punitive damages constitutionally may be awarded under a *respondeat superior* theory. *Louis Pisitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927).

entire award of $750,000 represented punitive damages" (Pet. 3-4 (footnote omitted)); from this starting point, petitioner contends that "the punitive damages award bears *no* relationship to any 'harm' suffered," and that the courts below therefore sanctioned "a punitive damages 'multiplier' equal to infinity." Pet. 9 (emphasis in original). But petitioner's factual assertion is demonstrably incorrect: there was—and must have been, under the trial court's jury instructions—a compensatory award in this case.

In fact, each count of respondent's complaint demanded compensatory damages. CR 271, 273, 273-274. The factual underpinnings of these claims were borne out at trial, where one of petitioner's own representatives agreed with the statement that "Massachusetts Mutual has got over $2000 of [respondent's] cash value." RT 503. Another of petitioner's representatives testified at trial, when asked "[h]ow much money would it take to get [respondent's insurance] program straightened out like he thought it was supported to be" (RT 221), that the amount was the sum of the accumulated loans (see RT 224-226), which amounted to many thousands of dollars. See Pl. Ex. 1, at 4. Respondent's counsel accordingly argued to the jury that it should award substantial compensatory damages (RT 534), and the trial judge instructed the jury that it could find petitioner liable for punitive damages only if it first awarded compensatory damages. RT 620-621. As result, the only thing certain here is that *some* portion of the damage award was compensatory.[8]

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[8] Petitioner asserts (Pet. 10) that respondent "admittedly had no out-of-pocket expense." In fact, respondent never admitted any such thing. Even leaving aside the loan liability, respondent's insurance policy was stripped of its current cash value; that caused an out-of-pocket loss in precisely the same manner as would the looting of a bank account. Petitioner also contends that the damage to respondent "was a temporary obligation that would be eliminated in

While the jury did not specify the punitive portion of the award, petitioner necessarily is incorrect in asserting that the entire judgment should be treated as representing punitive damages. To the contrary, under Alabama law the largest possible amount must be presumed to have been *compensatory*. See *McDowell v. Key*, 557 So.2d 1243, 1249 (Ala. 1990). And the impossibility of determining the portion of the judgment that is punitive makes this case an especially *poor* vehicle in which to address petitioner's rather unlikely assertion that the Due Process Clause requires some fixed relationship between compensatory and punitive damages. In any event, petitioner did not contend before the Alabama Supreme Court that there is any such constitutional requirement. See App. Br. No. 88-949, at 67-90. Again, then, the issue advanced by petitioner is not properly before the Court in this case.

3. Petitioner's remaining challenge is directed at the asserted inadequacy of the jury charge. Pet. 8. The instruction in this case was essentially identical to the

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time without any increase in the premium he had been paying." Pet. 10. This assertion evidently rests on complex calculations that petitioner undertook to demonstrate that respondent's loans would be paid off, through the accumulation of policy premiums, some time in the early twenty-first century. See Pl. Ex. 1, at 4. The short answer to petitioner's argument on this point is that the jury, by awarding compensatory damages, rejected it. In any event, defrauding someone of funds now, with the expectation that the funds will be repaid some 20 years in the future, plainly causes actual damage in the here-and-now. Finally, petitioner takes respondent to task for "never disavow[ing] the expanded [insurance] coverage." Pet. 9. Any confusion about the scope of respondent's coverage is attributable to petitioner, however, which indicated in response to an interrogatory that the second policy "appears to have lapsed." CR 62. Petitioner amended the interrogatory response on the eve of trial to indicate that the policy had been "placed in a suspense status." CR 264. Petitioner also filed a counterclaim seeking to have the policy canceled. CR 141, 262. The courts below took no action on the counterclaim.

one at issue in *Haslip*. See *Pacific Mutual Insurance Co. v. Haslip*, No. 89-1279, JA 105-106. It therefore would be appropriate—assuming the Court finds the constitutional issues here to have been properly preserved—to hold this petition pending the decision in *Haslip*.

Having said that, however, it is worth noting that petitioner's description of the relevant Alabama law is, at best, highly selective. Petitioner suggests that a jury award of punitive damages will not be disturbed in Alabama unless it " 'shock[s] the judicial conscience or [is] so excessive as to indicate passion or prejudice on the part of the trier of fact.' " Pet. 5 n.4 (citation omitted). The rule attacked by petitioner, however, is wholly outdated. In fact, the Alabama Supreme Court has made rigorous post-trial review a crucial element of the punitive damages system. Beginning with its decision in *Hammond*, that court has wrestled repeatedly and at length with the issue, and has set down detailed and mandatory requirements to govern the review of damages. It thus has insisted that trial judges gauge claims of excessiveness in light of a wide range of factors, including the harm caused (or likely to be caused) by the defendant's conduct, the degree of reprehensibility of that conduct, the profit gained by and financial condition of the defendant, the costs of litigation, and other penalties (civil or criminal) imposed on the defendant. See *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So.2d 812, 838-839 (Ala. 1989); *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 377 (Ala. 1989); *Wade*, 544 So.2d at 915-916; *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-224 (Ala. 1989); *Hammond*, 493 So.2d at 1379.

The Alabama Supreme Court also has imposed substantive limits on awards, establishing both "a requirement of 'reasonableness, of proportionality, of sensible relation between punishment and offense,' " and "a guarantee of 'not just bare survival, but continued productive

economic viability.' " *Industrial Chemical*, 547 So.2d at 838, quoting Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 155-156 (1986). Similarly, the court has made clear that "[p]unitive damages should not exceed an amount necessary to accomplish society's goals of punishment and deterrence." *Tapley*, 546 So.2d at 377. See also *Green Oil*, 539 So.2d at 223 (citation omitted) (" 'Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred' "). This appears to be the nation's most rigorous system of common law safeguards on punitive damages.

It is well-settled that such a system of post-judgment review may suffice to rectify even unconstitutionally vague jury instructions. See, *e.g.*, *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990). Assuming a constitutional defect in the instructions here, then, Alabama's system of mandatory review plainly had a curative effect in this case. And the trial court carefully engaged in the mandatory review, noting the misleading nature of petitioner's conduct (Pet. App. 15a), the necessity of deterring similar conduct (*id.* at 15a-16a), and the effect of the verdict on petitioner. *Id.* at 16a. The Alabama Supreme Court independently analyzed the record and expressly agreed "that the damages award was not excessive." *Id.* at 11a. Petitioner has offered no reason to doubt the constitutional adequacy of the standard used by the courts below in reaching these conclusions; to the contrary, it is telling that petitioner has at no point offered a substitute standard.

4. Finally, if the Court does hold this petition, it should be added that the defects in the record make this case an inappropriate vehicle with which to consider any issues that are not resolved in *Haslip*. As evidently also is true in *Haslip* (see No. 89-1279, Resp. Br. 42-44), it

is impossible here to determine how much of the damages award was punitive; this case therefore cannot be used to settle the question whether there must be a set relationship between the size of punitive and compensatory awards. And given the findings below relating to petitioner's own culpability, this case could not be the vehicle for settling any issues left open in *Haslip* concerning punitive *respondeat superior* liability. So long as the Court determines in *Haslip* that the Alabama system adequately guides or reviews the jury's discretion, the petition here should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 90-244

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

WILLIAM E. COLLINS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITIONER'S REPLY BRIEF

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PARTIES TO THE PROCEEDING

Massachusetts Mutual Life Insurance Company *
William E. Collins

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* The following are non-wholly owned subsidiaries of the Massachusetts Mutual Life Insurance Company as well as companies that may be deemed affiliates thereof:

Bay Colony Life Insurance Company of Arizona
MassMutual Asset Management Company, Inc.
MassMutual of Ireland, Ltd.
MML Investors Services, Inc.
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PETITIONER'S REPLY BRIEF

ARGUMENT

I. THE CONSTITUTIONAL ISSUES WERE ADEQUATELY RAISED BELOW

Respondent's suggestion that petitioner Mass Mutual did not preserve its due process objections to the punitive damages award in this case is patently in error. Respondent concedes, as he must, that Mass Mutual presented its objections both in its answer to Respondent's complaint and in its motion for judgment notwithstanding the verdict or in the alternative for a new trial. Resp. Br. at 6, 8; *see also* Pet. App. 19a-20a. Indeed, at

the JNOV stage, Mass Mutual set forth its objections not only in its motion, but also in its supporting 31-page memorandum, mostly devoted to the due process issues.

Nonetheless, Respondent argues that Mass Mutual waived its due process objection by failing to challenge appropriately the jury instructions used at trial. Resp. Br. at 7-8. The short answer to this is that Mass Mutual specifically objected to the jury instructions used by the trial court, and requested instructions that would have required any punitive damages award to be based on proof beyond a reasonable doubt or on clear and convincing evidence. While Respondent suggests that these efforts were inadequate to preserve the due process issue for appellate review on the ground that they challenged only the standard of proof, and not the breadth of the jury's discretion on punitive damages, *id.*, this distinction is an empty one. Mass Mutual proposed the higher standard of proof precisely to limit the jury's discretion as to the existence and amount of punitive damages. It objected to the jury instructions on due process grounds and proposed alternative instructions to remedy the deficiency. No more was required.

In any event, Respondent's waiver argument misstates both Alabama law and the effect of Alabama law on this Court's review. Under Alabama law, Mass Mutual's presentation of its due process claims as a defense in its pleadings was sufficient to preserve that issue for appellate review. *See Alabama Power Co. v. Capps*, 519 So. 2d 1328, 1330 (Ala.), *appeal dismissed*, 486 U.S. 1002 (1988); *Wallace v. Doege*, 484 So. 2d 404, 405 (Ala. 1986). Thus, Mass Mutual's claims are not procedurally barred under Alabama law, regardless of the form of its objections at trial.

Moreover, even if Mass Mutual had failed entirely to raise its claims prior to the verdict in accordance with state law, that would not have precluded review by this Court *unless* the Alabama courts had refused to review

the due process issue on this basis. This Court has rejected the view that it must independently assess whether a claim was preserved for review in accordance with state procedural standards. Rather, this Court has refused review only where the state court relied on such a state procedural bar as an independent basis for its decision. *See Osborne v. Ohio*, 110 S. Ct. 1691, 1703 (1990); *Harris v. Reed*, 109 S. Ct. 1038, 1045 (1989); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

Here, the Supreme Court of Alabama did not rely on any procedural bar in rejecting Mass Mutual's due process claims. Instead, the Alabama Supreme Court rejected Mass Mutual's due process claims on the merits, citing its earlier decision in *Haslip*, Pet. App. 10a. Moreover, it did so in the face of Respondent's arguments that review of Mass Mutual's due process claims was procedurally barred. Respondent's speculation that the Alabama Supreme Court nevertheless may not have intended to reach all of Mass Mutual's arguments in disposing of its due process challenge on the merits not only has no record basis in this case, but is irrelevant. As noted above, this Court will refuse to reach a federal claim only where the state court expressly relies on a state procedural bar as an independent basis for its decision. Accordingly, Respondent's concession that "the court below did not expressly refer to the Alabama rules in its rejection of petitioner's claim" effectively disposes of this argument.[1]

II. THE VICARIOUS LIABILITY ISSUE PRESENTED HERE IS WORTHY OF REVIEW

Respondent argues that the vicarious liability issue in this case should not be reviewed for three reasons. First,

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[1] Respondent concedes that the jury instruction here "was essentially identical to the one at issue in *Haslip*" and that "[i]t therefore would be appropriate—assuming the Court finds the constitutional issues here to have been properly preserved—to hold this petition pending the decision in *Haslip*." Resp. Br. at 12-13.

Respondent contends that the issue "is not independently worthy of review" because this Court has held that punitive damages are constitutionally permissible under a *respondeat superior* theory. This assertion is most directly refuted by the Court's grant of certiorari to review the similar issue in *Haslip*.

In any event, Respondent's suggestion that prior case law should foreclose review of this issue is hardly convincing. The *only* case Respondent cites in support of this view is a 1927 decision of this Court—*Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927). The Alabama statute at issue there authorized punitive damages against an employer for the negligence of its employees *resulting in death*, and was upheld partly on the basis that it was intended to prevent loss of life.[2] In light of (a) the ambiguity as to the intended scope of the *Louis Pizitz Dry Goods Co.* holding, and (b) the expansion of this Court's due process jurisprudence in the intervening six decades, the existence of that case certainly does not eliminate the need for further review.

Respondent's suggestion that Mass Mutual is attempting to raise the vicarious liability issue for the first time in this Court by referring to Thomas Smart, the agent who sold the insurance policy here in question, as an "independent contractor agent" is equally unavailing. Resp.

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[2] As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented.

Louis Pizitz Dry Goods Co., 274 U.S. at 116 (1927).

Br. at 2 n.1. Contrary to Respondent's suggestion, Mass Mutual is not attempting to deny that Smart was its agent. Indeed, Mass Mutual's certiorari petition and its filings in the courts below repeatedly refer to Smart as its "agent." Pet. 2, 3, 9, 10. This reference to Smart as an "independent contractor agent" in its petition is designed only to emphasize that Smart was far less subject to control by Mass Mutual because he was not an employee of the company.[3] The fact that the company did not even know of Smart's actions until after his death heightens the unfairness of the award of punitive damages here.

Finally, Respondent's suggestion that the vicarious liability issue is not here present because Mass Mutual itself was found guilty of misconduct is simply wrong. Under Alabama law, a principal may be held liable in tort for the acts of its agents regardless of whether it authorized or ratified the acts, and indeed regardless of whether it actually forbade them. *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So. 2d 537, 541 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990); *Potomac Leasing Co. v. Bulger*, 531 So. 2d 307 (Ala. 1988); *Autrey v. Blue Cross & Blue Shield of Alabama*, 481 So. 2d 345 (Ala. 1985). While the trial judge held that the evidence supported a finding that "the Defendant's conduct was intentional or reckless,"[4] he did not refer to any conduct

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[3] Contrary to respondent's assertion, there is no basis in the record for the assumption that "the agent was licensed to sell insurance *only* for petitioner." Resp. Br. at 10. The two exhibits cited by respondent do not resolve the question. Exhibit 29 is Mass Mutual's request for a renewal of licenses for a list of agents and Exhibit 31 is a copy of Smart's license for 1984 with the State of Alabama for Mass Mutual. There was no evidence as to the exclusivity of Smart's agency relationship with Mass Mutual.

[4] In ruling on Mass Mutual's JNOV motion, the trial judge stated as follows:

> The jury could have concluded, and the evidence amply supported such conclusion, that the Defendant's conduct was inten-

by Mass Mutual itself, but only to conduct by Smart that Alabama law rendered imputable to Mass Mutual. The trial judge's statement that such conduct "was in furtherance of [Mass Mutual's] ordered corporate policy of updating its old policies," Pet. App. 15a, hardly implies that Mass Mutual approved the use of fraudulent means to achieve those ends. In sum, there was no evidence in the record to indicate that Mass Mutual authorized or ratified Smart's alleged misconduct, nor did the trial judge make such a finding. As a result, this case squarely presents the question whether punitive damages based on vicarious liability are consistent with due process.

III. THE ACTUAL DAMAGES IN THIS CASE ARE NON-EXISTENT OR MINIMAL

In the transaction that led to this litigation, Respondent received from Mass Mutual precisely what he had bargained for: a near seven-fold increase in his insurance coverage from $15,000 to $100,000 with no increase in his monthly premium of $19.51. The cost of the additional coverage was to be financed by policy loans and policy dividends, with the loans being repaid over time from future policy dividends. The loans were to be fully repaid in 2002, when Respondent reached age 54. These facts were fully set forth in a May 9, 1983 letter from agent Smart to Respondent which—as the Alabama Supreme Court found—was erroneously excluded from the jury's consideration. *See* Pet. 3 n.2.[5] Because Respondent

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> tional or reckless and was in furtherance of its ordered corporate policy of updating its old policies which had a guaranteed low interest rate in the event of borrowing against the cash value, by providing a new and higher and more flexible rate and inducing the sale (and resulting commissions) of new insurance by the promise of additional dividends.

Pet. App. 15a.

[5] The letter explained the arrangement to respondent, a bank vice-president, as follows:

received the full value for which he bargained, indeed, a value that he has never disavowed or sought to rescind, he suffered no actual damages.

Contrary to Respondent's description, Mass Mutual does not argue that due process "requires some fixed relationship between compensatory and punitive damages." Resp. Br. at 12. Rather, Mass Mutual contends that due process requires, at a minimum, that punitive damages be reasonably related to actual damages. Here, Respondent argues that he suffered actual damages to the extent of the cash value of his $15,000 policy used to finance the new policy, which coverage he continues to enjoy. Resp. Br. at 11.[6] That cash value totalled between $1,500 and $1,800. Pet. App. 2a. Whether the actual damages in this case are zero, as petitioner argues, or $1,800, as Respondent argues, the $750,000 jury award

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> Under this arrangement, you would be able to purchase as much as $75,000, or perhaps even $85,000 additional coverage. When the cash value of paid additions is all used, you would then leverage current premium payments against future dividends by borrowing against policy guaranteed values. This, of course, would involve policy loans and loan interest. However, under dividend leveraging, the loan interest is *not paid*—you are still paying your same $19.51 a month. When the future dividends exceed the annual premium cost, the excess pays off the loan for you.

The letter was accompanied by a chart setting out projections of the policy dividends and loans for each year through 2002. The text at the bottom of the chart explained, "Additional net premium due, after paid additions are exhausted, is paid from policy loans against guaranteed cash value."

[6] Respondent also refers to the existence of loan liability apart from the loans against the cash value of the policies. Resp. Br. at 11 n.8. That reference is incorrect. The only loans involved were policy loans against the accumulated cash values and dividends of the two policies. At no time would Respondent have any loan liability over and above the value inherent in the policies. Further, those loans would have been fully liquidated over time from dividends on the policies with no additional payment by respondent.

obviously bears no reasonable relation to any actual damages.

The contrast in this regard between the present case and *Haslip* is striking. Unlike Respondent Collins, who had no out-of-pocket expense and whose "loss" was not even alleged to exist other than on paper, the plaintiff in *Haslip* learned in the hospital that her health insurance had been cancelled; consequently, she was liable for $2,500 in medical bills, of which she had to pay $600 to be discharged from the hospital. *Haslip*, 553 So. 2d at 539. Although the $1,040,000 award in *Haslip* is extraordinarily high in relation to the actual damages, there were at least actual damages in that case, unlike the theoretical damages claimed here.[7]

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[7] As for respondent's contention that the availability of post-trial review under the *Hammond* guidelines eliminates the due process issue in this case, it should be noted that this Court considered the due process issue in *Haslip* worthy of consideration despite the fact that those guidelines had been applied in that case. *Haslip*, 553 So. 2d at 543.

As documented in the brief *amicus curiae* of the American Council of Life Insurance and the Health Insurance Association of America ("Amicus Br."), Alabama's review procedure has apparently had little effect. Amicus Br. at 10. That is not surprising, as the *Hammond* guidelines do not purport to serve as the equivalent of constraints on the jury. Rather, they permit a court to order a new trial or remittitur "only where the record establishes that the award is excessive or inadequate *as a matter of law*, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive. . . ." *Hammond v. Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986) (emphasis added).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

WILLIAM E. COLLINS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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BRIEF AMICI CURIAE FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AND THE HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether a jury award of punitive damages violates the Due Process Clause of the Fourteenth Amendment where the jury rendered the award in the absence of meaningful standards governing its discretion to award those damages and where the award bears no rational relationship to the purposes of deterrence and punishment.

2. Whether a jury award of punitive damages violates the Fourteenth Amendment where the award rests entirely on a *respondeat superior* theory with no showing that the defendant participated in or had knowledge of its agent's alleged misconduct.

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IN THE

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OCTOBER TERM, 1990

No. 90-242

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

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Respondent.

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BRIEF AMICI CURIAE FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AND THE HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

INTERESTS OF THE AMICI [1]

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of 616 member life insurance companies, 435 of which hold licenses to conduct insurance business in Alabama. The ACLI's members currently hold 95 percent of the life insurance in force in legal reserve life insurance companies in the United States and 92.6 percent of such insurance in Alabama. The Health Insurance Association of America ("HIAA") represents the interests of 320 member

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[1] Counsel for both the Petitioner and the Respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

companies that write over 85 percent of the health insurance written by commercial insurance companies in the United States and provide health insurance coverage to approximately 95 million Americans; approximately 230 of the HIAA's members hold licenses in Alabama.

The central issue in this case—whether and to what extent the Due Process Clause of the Fourteenth Amendment imposes limitations on a jury's discretion to award punitive damages and on the amounts of those damages —is vitally important to the members of the ACLI and HIAA. In recent years, courts have permitted juries to assess substantial punitive damages awards against insurance companies, in the absence of due process constraints, and have deferred to those awards even though they are imposed without meaningful standards and bear no rational relationship to the purposes of deterrence and punishment. These decisions, like the decision below, drastically and unpredictably enlarge the risks facing insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance. Because of their genuine interest in the constitutionality of current punitive damages law, therefore, the ACLI and the HIAA have filed numerous *amici* briefs in this Court in cases involving this issue. *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279; *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

The ACLI and the HIAA thus file this brief to provide the Court with their unique perspectives, based on the experiences of their broad-based constituencies, on the constitutionality of punitive damages law and to offer additional arguments that underscore the importance of this Court's review.

STATEMENT

This case involves the constitutionality of an Alabama jury's assessment of a substantial punitive damages award against Petitioner, Massachusetts Mutual Life Insurance Company ("Massachusetts Mutual"), based on the allegedly fraudulent conduct of an independent contractor agent in selling a life insurance policy to a bank executive, Respondent William Collins. The Petitioner's Statement of the Case recites the essential facts and the conclusions of the courts below; the *amici* will not repeat them here.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD DECIDE CONCURRENTLY WITH THE SIMILAR ISSUES BEFORE THE COURT IN *PACIFIC MUTUAL LIFE INSURANCE COMPANY v. HASLIP*

This Court has recognized the importance of the constitutional issues that this case presents. In granting the writ of certiorari in *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990) (No. 89-1279), the Court has agreed to hear argument concerning (1) the limits that the Due Process Clause of the Fourteenth Amendment imposes on a jury's discretion to award punitive damages and on the amounts of those awards and (2) the propriety of assessing punitive damages against an insurer, based on a *respondeat superior* theory, for the allegedly fraudulent conduct of an errant agent. This case, which presents similar issues, is no less deserving of this Court's review.

That this Court has already agreed to review these issues in *Haslip* does not obviate the need for concurrent (or even independent) review in the instant case. While the issues that these two cases present are similar, they

are by no means coextensive. Indeed, this Court can resolve the vicarious liability issue in *Haslip* without reaching the related issue in this case. In *Haslip*, the Court need only decide whether the assessment of punitive damages against an insurer based on the fraudulent conduct of a non-exclusive agent in pocketing the premiums from his sale of an insurance policy violates due process, where the agent acted unlawfully to benefit himself rather than his unknowing principal. It need not reach in *Haslip* the related question presented here: that is, whether an award of punitive damages against an insurer based on the allegedly fraudulent conduct of an agent in selling an insurance policy violates due process, where the insurer neither knew about nor ratified the conduct but apparently benefitted from it. The instant case thus presents a variant of the *respondeat superior* issue that warrants resolution, whether concurrent with or independent of *Haslip*.

Concurrent consideration of these two cases would, moreover, likely ensure the fullest resolution of *both* the vicarious liability issues *and* the punitive damages issues that these cases present. Together, these cases provide the Court with the opportunity to define more fully, based on two distinct factual settings, the parameters of vicarious liability in the context of punitive damages. Together, these cases provide the Court with an ample record to evaluate whether punitive damages law, as applied in Alabama, comports with substantive and procedural due process. And, together, these cases minimize the possibility that the Court will, for prudential reasons, once again have to defer resolution of these important due process issues.[2] The Court should, therefore, grant review.

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[2] This Court could, for example, decide in *Haslip* that due process precludes assessing punitive damages against an insurer based on the allegedly fraudulent conduct of a non-exclusive agent, where the insurer neither ratified nor benefitted from the conduct, and thus vacate the judgment on that ground alone—perhaps leaving un-

II. THIS CASE PROVIDES AN APPROPRIATE SETTING FOR THIS COURT TO DEFINE THE LIMITATIONS THAT THE DUE PROCESS CLAUSE IMPOSES ON PUNITIVE DAMAGES AWARDS OF CIVIL JURIES

This Court has recognized that the constitutionality of current punitive damages law, under the Due Process Clause of the Fourteenth Amendment, is an "important issue[] which, in an appropriate setting, must be resolved." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986). This case, perhaps even more than *Haslip*, presents a compelling opportunity for this Court to dispose of this question. Massachusetts Mutual timely raised its constitutional challenge to the assessment of punitive damages in the courts below; despite its challenges, the trial court sustained the jury's assessment of punitive damages against Massachusetts Mutual even though the jury awarded those damages with virtually no guidance whatever and even though the respondent had suffered no actual harm; and the Alabama Supreme Court declined to disturb the result of the jury's exercise of standardless discretion—an award of punitive damages against an insurer, based on conduct that it did not know about or condone, that bears no rational relationship to the purposes of deterrence and punishment.

A. The Question Whether A Jury's Standardless Discretion To Award Punitive Damages Violates Due Process Warrants This Court's Review

"The idea that a jury should be given guidance in its decisionmaking is . . . hardly a novel proposition." *Gregg v. Georgia*, 428 U.S. 153, 192-193 (1976). But

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resolved the important constitutional questions that arise from a jury's standardless assessment of excessive punitive damages awards. Although the same result is possible in the instant case, concurrent consideration of these cases, at minimum, enhances the possibility that this Court will finally decide these important questions.

the present procedure for awarding punitive damages affords no intelligible standards for a jury charged with deciding whether to award punitive damages and, if so, in what amount. This case starkly reveals this constitutional deficiency.

Current punitive damages law leaves the decision to award such damages to the sole discretion of a jury that, based on a mere preponderance of the evidence, has found a civil defendant liable under a subjective standard that may range from "maliciousness" to some degree of "negligence." Exercising their "wholly standardless discretion" (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, Scalia, JJ., concurring)), juries " 'may or may not make such an award' " (*Smith v. Wade*, 461 U.S. 30, 52 (1983) (citation omitted)); they make that decision "guided by little more than an admonition to do what they think is best." *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan, Marshall, JJ., concurring). This "deep[] flaw" (*id.*) of punitive damages law subjects defendants to the whims of a jury and exposes them to punitive damages awards "frequently based upon . . . caprice and prejudice." *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting).

Current punitive damages law likewise fails to define what amount of punitive damages the jury may fairly award. "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 87 (O'Connor, Scalia, JJ., concurring). On the contrary, jury discretion over the amounts of punitive damages "is limited only by the gentle rule that they not be excessive." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Thus, "[w]ithout statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and po-

tentially devastating, decision." *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring). This grant of "wholly standardless discretion to determine the severity of punishment" (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 88 (O'Connor, Scalia, JJ., concurring)), results in wildly varying "windfall recoveries [that are] unpredictable and potentially substantial." *International Brotherhood of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979).

These flaws are plainly evident in this case. After finding Massachusetts Mutual liable under a liberal *respondeat superior* standard, the jury exercised its discretion to award punitive damages with little more guidance than to do what it thought was best. Told that it could award punitive damages in its discretion, the jury punished Massachusetts Mutual with an arbitrary award that bore no rational relationship to any harm caused. After all, the respondent apparently suffered no actual damages; indeed, he received the insurance that he purchased at the price he agreed to pay. The jury made this award, moreover, without instructions providing meaningful standards for determining whether, and in what amount, to award punitive damages. The absence of such guidance deprived Massachusetts Mutual of the "fundamental fairness" that the Due Process Clause requires.

B. The Excessive Punitive Damages Award In This Case Violates Substantive Due Process And Warrants This Court's Review

Under the punitive damages laws of most jurisdictions, juries can and do "award any amount of punitive damages." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 87 (O'Connor, Scalia, JJ., concurring). Reviewing courts, moreover, vary unpredictably in their willingness to adjust those awards. Constrained by the presumption that jury verdicts are correct, these courts

provide little review of excessive punitive damages awards, leaving intact awards that bear no rational relationship to the stated purposes of these damages, i.e., deterrence and punishment. This substantive due process flaw is readily apparent in this case.

The notion that reviewing courts can, consistent with due process, overturn excessive damages awards is not new. In the early part of this century, this Court began to review extra-compensatory damages awards under the Fourteenth Amendment to determine whether they were so "grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909); *see also Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 351 (1913). Under the "gross excessiveness" test, the Court independently evaluated whether the awards properly served the deterrent and punitive purposes of these extra-compensatory damages. *See St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. 63, 67 (1919) (justifying penalty in light of "the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates"); *see also Waters-Pierce Oil Co. v. Texas*, 212 U.S. at 111; *Missouri Pacific Ry. v. Humes*, 115 U.S. 512, 523 (1885). In this manner, the Court determined whether these awards were "wholly disproportioned to the offense and obviously unreasonable." *St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 66-67. Although the Court ultimately upheld many extra-compensatory awards under this "excessiveness" test, it did so largely because juries rendered these awards within rational legislative bounds and, accordingly, deserved deference. *See Missouri Pacific Ry. v. Humes*, 115 U.S. at 522; *St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 66; *Waters-Pierce Oil Co. v. Texas*, 212 U.S. at 112.

The punitive damages award in this case cannot stand under these principles. This case does not involve any

legislative policy choice concerning the appropriate measure of punitive damages; it reflects only the decision of an Alabama jury to assess, in the absence of any legislative guidance, a substantial punitive damages award against Massachusetts Mutual.[3] That award, moreover, rationally serves neither the deterrent nor retributive purposes of punitive damages and thus is constitutionally excessive. It greatly exceeds an amount necessary to "deter" Massachusetts Mutual from future misconduct; indeed, Massachusetts Mutual did not even know about, much less participate in, its independent contractor agent's alleged misdeeds. Further, the award greatly exceeds an amount, if any, necessary to punish Massachusetts Mutual. Massachusetts Mutual did not "deserve" substantial punishment for the unauthorized misdeeds of its agent; it surely did not "deserve" a punishment that bore *no* relation to the respondent's actual damages. Only this Court can correct this deprivation of substantive due process.

C. Alabama's Post-Verdict Review Procedure Does Not Obviate The Importance Of This Court's Review

That the courts below purported to engage in a post-verdict review of the excessiveness of the jury's punitive damages award does not cure its constitutional defects. Indeed, like *Haslip*, this case presents yet another example of the utter failure of that procedure to ensure meaningful and substantive review of the amounts of punitive damages awards.

Post-verdict review of punitive damages under the deferential "guidelines" that the Alabama Supreme Court established in *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986), affords neither a "hard" nor

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[3] The Alabama legislature has recently enacted a statute that places a $250,000 "cap" on punitive damages awards in certain types of cases. *See* Ala. Code § 6-11-21 (1989). It did not do so, though, until June 11, 1987, after the cause of action arose in this case.

"long" look at these awards. *See Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring) (reviewing courts should "look longer and harder" at the punitive damages awards of civil juries rendered in the absence of statutory guidelines). After all, even under these guidelines, the Alabama courts still must give substantial deference to the jury's award and " 'presume that the verdict [is] correct.' " *Charter Hosp. v. Weinberg*, 558 So.2d 909, 911 (Ala. 1990), quoting *Campbell v. Burns*, 512 So. 2d 1341, 1343 (Ala. 1987). Not surprisingly, there is little evidence that this post-award review in Alabama has any appreciable impact. It clearly had no effect in this case, where the court below let the $750,000 award stand under *Hammond;* it had no effect in *Haslip*, where the same court allowed a $1 million award to survive under *Hammond* (*see* 553 So. 2d at 544-45) (Maddox, Steagall, JJ., dissenting in part)); and it has had little effect in other post-*Hammond* cases in Alabama (*see, e.g., United American Ins. Co. v. Brumley*, 542 So. 2d 1231 (Ala. 1989) ($1 million punitive damages for bad faith failure to pay a claim affirmed even though compensatory damages totalled only $5,000); *State Farm Fire & Casualty Ins. Co. v. Lynn*, 516 So. 2d 1373 (Ala. 1987) ($250,000 punitive damages for insurance fraud sustained even though compensatory damages totalled only about $21,000)).

The *Hammond* guidelines thus do little, if anything, to enhance the depth of post-verdict review of constitutionally excessive punitive awards—and they do nothing to address the "constitutionally defective" jury process that produces these excessive awards. *See Charter Hosp. v. Weinberg*, 558 So.2d 909, 915-16 (Ala. 1990) (Houston, J., concurring specially). They do nothing, therefore, to minimize the need for this Court's review.

CONCLUSION

The petition for certiorari should be granted.

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